

NO. 48324-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARCUS REED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Michael Schwartz, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE OBJECTION TO IMPROPER ADMISSION OF DAVIS-ORR'S OPINION WAS TIMELY RAISED AND THUS PRESERVED FOR REVIEW.

Melynda Davis-Orr testified that she had heard Daniel, Davis, and Reed planning a robbery. RP 1212. On cross exam she admitted she never told police she actually heard anyone say they were going to do a robbery. RP 1248. On redirect she explained that she did not recall anyone saying they were going to do a robbery. She told the detectives that, based on everything she heard and saw, she figured they were going to do a robbery. RP 1266-67.

When the prosecutor asked Davis-Orr whether she had told detectives that she figured from what they were saying that they had done a robbery, counsel for Reed objected that the question called for speculation, and the court overruled. RP 1266. The prosecutor restated the question, and counsel for Davis objected that the prosecutor was asking multiple questions, and they were vague. The court overruled. Counsel for Davis objected that the question also called for improper speculation and opinion. The court again overruled. RP 1266-67.

Counsel for Reed thereafter made a record outside the jury's presence regarding the objection to Davis-Orr's testimony. Counsel argued that it was improper opinion and infringed on Reed's right to trial

by jury, because it is up to the jury to determine whether the defendants committed the charged crimes. RP 1272-73. Counsel for Davis joined the argument, and the prosecutor responded. RP 1273-74. The court stated that it understood that counsel for Reed's "objection goes to whether the witness improperly expressed an opinion about the ultimate issue, that is the defendant's guilt or innocence in this case." RP 1274-75. The court overruled the objection, finding the prosecutor's question and the testimony it sought was proper rehabilitation of a witness after cross exam. RP 1275.

The State argues in its brief that Reed's attorney's argument to the trial court regarding improper opinion was untimely. Since counsel objected during redirect of Davis-Orr on the basis of speculation, and joined the objection as to improper opinion after she testified, Reed has waived any objection on the basis of improper opinion. Br of Resp. at 31, n.5.

First, the State overlooks the fact that improper opinion testimony violates the defendant's constitutional right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Thus, an explicit or nearly explicit opinion on the defendant's guilt or credibility can constitute a manifest constitutional error, which may be challenged for the first time

on appeal. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007); RAP 2.5(a).

In any event, the State's contention that Reed waived his objection on the basis of improper opinion is not supported by the record or case law. While it is true that an objection that does not specify the ground upon which it is based is not sufficient to preserve the question for appellate review, the purpose of this requirement is so that the judge may understand the question raised and the adversary has the opportunity to remedy the claimed defect. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). "When an objection is so indefinite as not to call the court's attention to the real reason for the testimony's inadmissibility, error may not be based upon the overruling of the objection." Id. (Citing Coleman v. Montgomery, 19 Wash. 610, 53 P. 1102 (1898)). Thus, an appellant may not assign error to admission of evidence on a certain ground when no objection was made to the testimony on that ground. Id.

Here, contrary to the State's contention, the issue raised on appeal was preserved in the trial court. The record is abundantly clear that the objection as to opinion was raised and ruled on before Davis-Orr answered the prosecutor's question. RP 1267. The record also shows that the court understood the nature of the objection and that Reed was challenging the testimony on that basis. RP 1274-75. Moreover, the prosecutor had the

opportunity to address the objection and remedy the error. RP 1267-74.
This Court should reject the State's suggestion that Reed waived his challenge to the improper opinion testimony.

B. CONCLUSION

For the reasons addressed above, and for all the reasons argued in the Brief of Appellant, this Court should reverse Appellant's convictions.

DATED December 15, 2016.

Respectfully submitted,



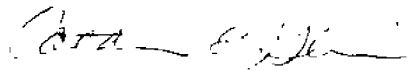
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Catherine E. Glinski
Done in Port Orchard, WA
December 15, 2016

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